

Sep 11, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MELISSA R.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

No. 1:18-CV-03201-JTR

ORDER GRANTING, IN PART,
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 13, 17. Attorney D. James Tree represents Melissa R. (Plaintiff); Special Assistant United States Attorney Lars Joseph Nelson represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 3. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, IN PART**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and

¹ Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

1 **REMANDS** the matter to the Commissioner for additional proceedings pursuant to
2 42 U.S.C. § 405(g).

3 **JURISDICTION**

4 Plaintiff filed applications for Disability Insurance Benefits and
5 Supplemental Security Income on November 9, 2013 and May 29, 2014,
6 respectively, alleging disability since November 15, 2012, due to bipolar disorder,
7 PTSD, arthritis, nerve pain in her right leg, tenosynovitis in her right wrist, and
8 swelling of her left knee. Tr. 88, 286. The applications were denied initially and
9 upon reconsideration. Tr. 144-51, 156-66. Administrative Law Judge (ALJ)
10 Stephanie Martz held a hearing on September 7, 2017, Tr. 37-85, and issued an
11 unfavorable decision on November 24, 2017, Tr. 15-30. Plaintiff requested review
12 from the Appeals Council. Tr. 274-75. The Appeals Council denied Plaintiff's
13 request for review on August 16, 2018. Tr. 1-5. The ALJ's November 2017
14 decision thus became the final decision of the Commissioner, which is appealable
15 to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for
16 judicial review on October 16, 2018. ECF No. 1, 5.

17 **STATEMENT OF FACTS**

18 Plaintiff was born in 1976 and was 36 years old as of her alleged onset date.
19 Tr. 29. She has a GED and an Associate's degree. Tr. 48. Her work history has
20 consisted of a number of short-term jobs, including fast food, care giving, sales,
21 and general labor. Tr. 28, 324. She had a substance abuse problem until attending
22 chemical dependency treatment in early 2014. Tr. 537-39. Over the duration of
23 her claim, she has received treatment for her mental health conditions, in addition
24 to undergoing two knee surgeries and carpal tunnel release surgery. Tr. 1230,
25 1233, 1236.

26 **STANDARD OF REVIEW**

27 The ALJ is responsible for determining credibility, resolving conflicts in
28 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,

1 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
2 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
3 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
4 only if it is not supported by substantial evidence or if it is based on legal error.
5 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
6 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
7 1098. Put another way, substantial evidence is such relevant evidence as a
8 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
9 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
10 rational interpretation, the Court may not substitute its judgment for that of the
11 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
12 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
13 administrative findings, or if conflicting evidence supports a finding of either
14 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
15 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
16 supported by substantial evidence will be set aside if the proper legal standards
17 were not applied in weighing the evidence and making the decision. *Browner v.*
18 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

19 SEQUENTIAL EVALUATION PROCESS

20 The Commissioner has established a five-step sequential evaluation process
21 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
22 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through
23 four, the burden of proof rests upon the claimant to establish a prima facie case of
24 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is
25 met once a claimant establishes that a physical or mental impairment prevents the
26 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),
27 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds
28 to step five, and the burden shifts to the Commissioner to show (1) the claimant

1 can make an adjustment to other work; and (2) the claimant can perform specific
2 jobs that exist in the national economy. *Batson v. Commissioner of Social Sec.*
3 *Admin.*, 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make an
4 adjustment to other work in the national economy, the claimant will be found
5 disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

6 ADMINISTRATIVE DECISION

7 On November 24, 2017, the ALJ issued a decision finding Plaintiff was not
8 disabled as defined in the Social Security Act.

9 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
10 activity since the alleged onset date. Tr. 18.

11 At step two, the ALJ determined Plaintiff had the following severe
12 impairments: bipolar disorder versus depression, personality disorder, substance
13 abuse disorder, bilateral knee osteoarthritis, status post internal fixation of the left
14 medial tibial plateau fracture and left knee arthroscopy with partial medial
15 meniscectomy, status post right knee arthroscopy, obesity, seronegative arthritis,
16 and status post right carpal tunnel release. *Id.*

17 At step three, the ALJ found Plaintiff did not have an impairment or
18 combination of impairments that met or medically equaled the severity of one of
19 the listed impairments. Tr. 18-20.

20 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
21 she could perform light exertion level work with the following limitations:

22 she can stand and/or walk up to 4 hours in an 8-hour workday with
23 regular breaks for about 1 hour at a time. She has unlimited ability to
24 push/pull within these exertional limitations. She can occasionally
25 balance, stoop, kneel, crouch/squat, and crawl but cannot climb stairs,
26 ladders, or hills. She needs to avoid concentrated exposure to extreme
27 cold and hazards. She can understand, remember, and carry out
28 simple and detailed tasks and have occasional or superficial contact
with coworkers and should work independently, not on team or

1 tandem tasks. She should work away from the general public. She
2 needs a routine and predictable work environment.

3 Tr. 20.

4 At step four, the ALJ found Plaintiff was unable to perform her past relevant
5 work. Tr. 28.

6 At step five, the ALJ determined that, based on the testimony of the
7 vocational expert, and considering Plaintiff's age, education, work experience, and
8 RFC, she was capable of making a successful adjustment to other work that existed
9 in significant numbers in the national economy, including the jobs of router, small
10 products assembler, and inspector hand packager. Tr. 29-30.

11 The ALJ thus concluded Plaintiff was not under a disability within the
12 meaning of the Social Security Act at any time from the alleged onset date,
13 November 15, 2012, through the date of the decision, November 24, 2017. Tr. 30.

14 ISSUES

15 The question presented is whether substantial evidence supports the ALJ's
16 decision denying benefits and, if so, whether that decision is based on proper legal
17 standards.

18 Plaintiff contends the ALJ erred by (1) failing to assess any manipulative
19 limitations in the RFC; (2) failing to properly assess Listings 1.02 and 1.06; (3)
20 improperly assessing the medical opinion evidence; and (4) not fully crediting
21 Plaintiff's subjective allegations.

22 DISCUSSION

23 1. Manipulative limitations

24 Plaintiff argues the ALJ erred in failing to include any limitations in the RFC
25 to account for Plaintiff's severe right carpal tunnel syndrome. ECF No. 13 at 4-5.

26 At step two of the sequential evaluation process, the ALJ considers and
27 identifies the claimant's severe impairments, defined as those impairments that
28 significantly limit the claimant's physical or mental ability to do basic work

1 activities. 20 C.F.R. §§ 404.1520(c), 415.920(c). In formulating the residual
2 functional capacity, the ALJ must consider the claimant's remaining ability to do
3 physical and mental work activities on a sustained basis, considering all of the
4 claimant's impairments. 20 C.F.R. §§ 404.1545, 416.945. The residual functional
5 capacity is the most the claimant can still do despite her limitations. *Id.*; *see also*
6 Social Security Ruling 96-8p.

7 At step two, the ALJ found one of Plaintiff's severe impairments to be
8 "status post right carpal tunnel release," acknowledging that "the record confirms
9 the above impairments significantly limit the claimant's ability to perform basic
10 work activities." Tr. 18. However, the RFC contains no limitations on Plaintiff's
11 ability to use her right hand for manipulative activities. Tr. 20. The RFC therefore
12 appears inconsistent with the ALJ finding this impairment to be severe.

13 Defendant argues the ALJ reasonably excluded hand limitations from the
14 RFC because Plaintiff's right hand and wrist issues resolved after her carpal tunnel
15 release surgery. ECF No. 17 at 4-5. This argument fails to resolve the internal
16 inconsistency in the ALJ's decision. If an impairment is found severe, by
17 definition it causes some limitations on the individual's ability to perform work
18 activities, and thus must be accounted for in the RFC. If the ALJ determined
19 Plaintiff's carpal tunnel syndrome caused no functional limitations, then she should
20 have found it to be a non-severe impairment.

21 Furthermore, Plaintiff did not undergo carpal tunnel surgery until January
22 2015, over two years after her alleged onset date. Tr. 1236. The relevant period
23 for this claim began with Plaintiff's alleged onset date in November 2012. In
24 September 2012, prior to the alleged onset date, Plaintiff reported having had right
25 wrist pain for over a year. Tr. 484. She continued to periodically report
26 difficulties with her right hand and wrist over the next two years, with exams
27 showing diminished strength and nerve conduction studies demonstrating moderate
28 carpal tunnel syndrome. Tr. 443, 475, 653, 1172. She reported worsening

1 symptoms in early January 2015, Tr. 1179, and finally had release surgery at the
2 end of January 2015. Tr. 1236. Defendant’s argument that the record
3 demonstrates resolution of this impairment after the surgery does not cure the
4 ALJ’s failure to account for it in the RFC prior to the surgery. An ALJ must
5 consider all evidence, including changes to a claimant’s conditions with treatment
6 or the passage of time, in determining whether a finding of disability is or was
7 warranted for any of the relevant period. A condition need not be permanent to be
8 severe or disabling; it simply “must have lasted or be expected to last for a
9 continuous period of at least 12 months.” 20 C.F.R. §§404.1509, 416.909. In
10 some cases, evidence may support the establishment of a closed period of
11 disability, when the evidence demonstrates medical improvement. *See generally,*
12 *Attmore v. Colvin*, 827 F.3d 872 (9th Cir. 2016). On remand, the ALJ shall
13 reconsider the evidence and determine whether Plaintiff’s carpal tunnel syndrome
14 caused any work-related limitations, and if so, for how long.

15 **2. Medical opinion evidence**

16 Plaintiff argues the ALJ erred by improperly assessing the medical opinion
17 evidence. ECF No. 13 at 8-16. Specifically, she asserts the ALJ improperly
18 rejected opinions from two consultative examiners for the Washington State
19 Department of Social and Health Services, Dr. Carolyn Jackson and Dr. Thomas
20 Genthe. *Id.*

21 When an examining physician’s opinion is contradicted by another
22 physician, the ALJ is required to provide “specific and legitimate reasons” to reject
23 the opinion. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995). The specific
24 and legitimate standard can be met by the ALJ setting out a detailed and thorough
25 summary of the facts and conflicting clinical evidence, stating her interpretation
26 thereof, and making findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
27 1989). The ALJ is required to do more than offer her conclusions, she “must set
28

1 forth [her] interpretations and explain why they, rather than the doctors', are
2 correct.” *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

3 *a. Dr. Jackson*

4 Plaintiff underwent a consultative exam with Dr. Carolyn Jackson on August
5 12, 2015. Tr. 762-74. Dr. Jackson diagnosed Plaintiff with left knee osteoarthritis,
6 right knee pain post-surgery, history of right tibial shaft fracture, low back pain,
7 depression, hypertension, and history of meth abuse in remission. Tr. 763. Based
8 on the severity of these impairments, Dr. Jackson opined Plaintiff was severely
9 limited and unable to meet the demands of even sedentary work. Tr. 764.

10 The ALJ gave this opinion little weight, finding other treatment notes to
11 indicate improvement in Plaintiff’s knee pain with injections, and that bilateral
12 knee surgeries performed “shortly after this visit” were successful in relieving
13 symptoms. Tr. 26. The ALJ concluded, “while the claimant had a short period of
14 more significant knee problems, the problems substantially improved after the
15 surgeries, rendering this assessment less persuasive.” *Id.*

16 Plaintiff asserts the ALJ erred in her analysis because the record did not
17 support the finding of contemporaneous improvement with injections, and the
18 bilateral knee surgeries occurred 11 and 16 months after the opinion was given,
19 indicating the duration was much longer than the ALJ implied. ECF No. 13 at 10.²

22 ² Plaintiff also asserts the ALJ erred by failing to offer any reasons for
23 discounting Dr. Jackson’s limitations as they related to Plaintiff’s depression. ECF
24 No. 13 at 9. However, Dr. Jackson did not assess any work-related functions
25 pertaining to depression. Tr. 762-64. An ALJ need only “explain why significant
26 probative evidence has been rejected.” *Vincent v. Heckler*, 739 F.2d 1393, 1394-
27 95 (9th Cir. 1984). Because Dr. Jackson did not opine as to any limitations related
28 to depression, there was no opinion on this subject for the ALJ to discuss.

1 Defendant argues the ALJ's finding of improvement is supported by substantial
2 evidence. ECF No. 17 at 14-17.

3 The consistency of an opinion with the medical record in general is a
4 relevant factor for an ALJ to consider. 20 C.F.R. §§ 404.1527(c)(4),
5 416.927(c)(4). However, a review of the record shows that the ALJ's analysis is
6 not supported by substantial evidence.

7 The context of the cited records does not demonstrate any sustained
8 improvement from injections. The ALJ referenced Exhibit 18F/112 (contained in
9 this record at Tr. 783). The record reflects a July 23, 2015 office visit with Dr.
10 Kennedy, at which a third and final injection was administered to Plaintiff's knee.
11 Plaintiff reported the first two injections "helped a little bit, but not as much as she
12 would have liked." Tr. 783. Six days later, at her exam with Dr. Jackson, Plaintiff
13 reported the injection was "not working well." Tr. 768. The following day
14 Plaintiff returned to Dr. Kennedy's office, and as the Visco supplementation had
15 not worked well in her left knee, they proceeded with prescribing an unloading
16 knee brace for her right knee. Tr. 786. Records following this all indicate the
17 injections had not worked well and that she had "failed" conservative treatments.
18 Tr. 926, 934, 1043, 1204. In August 2015 Plaintiff reported receiving relief from
19 her right leg pain with her unloader brace, but continued to report left knee pain.
20 Tr. 1198. In December 2015 she reported her knee pain was stable and she began
21 walking a lot more without her brace, but in January she began using it again due
22 to worsening pain. Tr. 849, 869. The ALJ's characterization of the record showing
23 "improvement with injection and treatment" is not supported by substantial
24 evidence.

25 Similarly, the ALJ's finding that Dr. Jackson's opinion was less persuasive
26 due to Plaintiff substantially improving after surgery is not a specific and
27 legitimate reason for discounting the opinion. Plaintiff began reporting significant
28 knee pain in mid-2014. Tr. 587, 590, 648, 653. In the August 2015 opinion, Dr.

1 Jackson stated Plaintiff had been markedly to severely limited by her impairments,
2 including her knee problems, since mid-2014. Tr. 762. Plaintiff did not undergo
3 her left knee surgery until July 2016, Tr. 1233, followed by her right knee surgery
4 in December 2016. Tr. 1230. The ALJ's characterization of Plaintiff having "a
5 short period of more significant knee problems" and her surgery as "shortly after
6 this visit with Dr. Jackson" is not consistent with the record. Dr. Jackson's opinion
7 applied to Plaintiff's condition for more than one year, and Plaintiff did not
8 experience significant improvement from surgery for almost a year after the
9 opinion was given. As discussed in the preceding section, the ALJ must consider
10 the entire record, including periods of worsening or improving conditions, as well
11 as the possibility of a closed period of disability.

12 On remand, the ALJ shall reconsider Dr. Jackson's opinion in the context of
13 the entire record.

14 *b. Dr. Genthe*

15 Plaintiff underwent a consultative psychological exam with Dr. Thomas
16 Genthe in April 2014. Tr. 561-65. Dr. Genthe diagnosed borderline personality
17 disorder, major depressive disorder with anxious distress, and substance use
18 disorder. Tr. 563. He found Plaintiff was severely impaired in her ability to
19 communicate and perform effectively in a work setting, complete a normal
20 workweek without interruptions from psychologically based symptoms, and
21 maintain appropriate behavior in a work setting. Tr. 564. He also noted several
22 other mild and moderate limitations. *Id.* He concluded she was unlikely to
23 function adequately in a work setting until her psychological symptoms were
24 managed more effectively. Tr. 565.

25 The ALJ gave this opinion little weight, noting Plaintiff had primarily
26 complained of physical problems at this appointment and had demonstrated
27 improvement in her mental health following this exam. Tr. 26-27. The ALJ
28 additionally found Dr. Genthe's opinion that Plaintiff was "unlikely to function

adequately” was vague, and that the opinion did not meet the duration requirement. Tr. 27.

Plaintiff asserts the record does not support the ALJ’s interpretation of the report and the accompanying mental health treatment records. ECF No. 13 at 12-16. Defendant argues the ALJ’s interpretation of the record is supported by substantial evidence. ECF No. 17-20. Because this claim is being remanded on other bases, the ALJ will reconsider the medical record as a whole, including Dr. Genthe’s opinion.

3. Plaintiff’s subjective statements

Plaintiff contends the ALJ erred by improperly rejecting her subjective statements. ECF No. 13 at 16-21.

It is the province of the ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ’s findings must be supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying medical impairment, the ALJ may not discredit testimony as to the severity of an impairment merely because it is unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of malingering, the ALJ’s reasons for rejecting the claimant’s testimony must be “specific, clear and convincing.” *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). “General findings are insufficient: rather the ALJ must identify what testimony is not credible and what evidence undermines the claimant’s complaints.” *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

The ALJ concluded Plaintiff’s medically determinable impairments could reasonably be expected to produce her alleged symptoms; however, Plaintiff’s statements concerning the intensity, persistence and limiting effects of those symptoms were not entirely consistent with the medical evidence and other

1 evidence in the record. Tr. 21. The ALJ offered the following reasons for
2 disregarding Plaintiff's subjective complaints: (1) Plaintiff made inconsistent
3 statements about her symptoms; (2) her testimony was not consistent with medical
4 evidence of record; (3) she had long periods with no mental health treatment; (4)
5 she was able to care for her own activities of daily living. Tr. 21-26.

6 An ALJ may consider inconsistent statements by a claimant in assessing the
7 reliability of her reports. *Popa v. Berryhill*, 872 F.3d 901, 906-07 (9th Cir. 2017);
8 *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001). However, merely
9 asserting that a claimant made inconsistent statements without identifying what the
10 inconsistencies are does not constitute a clear and convincing reason. The ALJ
11 stated Plaintiff offered inconsistent statements about her symptoms, but failed to
12 identify any actual inconsistencies in the record. The fact that an individual
13 experienced fluctuations in her symptoms over a five year period is insufficient to
14 establish inconsistency that calls into question the reliability of her reports.

15 A claimant's daily activities may support an adverse credibility finding if the
16 activities contradict her other testimony. *Orn v. Astrue*, 495 F.3d 625, 639 (9th
17 Cir. 2007). However, the mere fact that a claimant is capable of performing some
18 basic daily activities needed for everyday survival does not necessarily detract
19 from her overall credibility. *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir.
20 2014); *Benecke v. Barnhart*, 379 F.3d 587, 594 (9th Cir. 2004). The Ninth Circuit
21 has repeatedly found that the ability to perform some basic activities is not
22 necessarily inconsistent with disability:

23 We have repeatedly warned that ALJs must be especially cautious in
24 concluding that daily activities are inconsistent with testimony about pain,
25 because impairments that would unquestionably preclude work and all the
26 pressures of a workplace environment will often be consistent with doing
27 more than merely resting in bed all day.
28

1 *Garrison*, 759 F.3d at 1016; *see also Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
2 1989) (“[M]any home activities are not easily transferable to what may be the more
3 grueling environment of the workplace, where it might be impossible to
4 periodically rest or take medication.”).

5 The ALJ failed to identify any specific daily activities that she found to be
6 inconsistent with Plaintiff’s allegations of pain and other limitations. In the five-
7 page summary of the medical evidence, the ALJ only vaguely refers to Plaintiff’s
8 ability to “care for her own activities of daily living” without identifying what
9 those activities consisted of.³

10 While an ALJ may consider the fact that the extent of treatment sought by an
11 individual is not comparable to the degree of limitation alleged, she must first
12 consider possible reasons the claimant may not have sought more treatment.
13 Social Security Ruling 16-3p. Such reasons can include lack of resources or access
14 to treatment, symptoms reaching a tolerable level, the claimant being able to
15 structure her day to avoid aggravating symptoms, or the conditions themselves

17 ³ The ALJ makes one reference to Plaintiff “babysitting five young children daily”
18 in June 2014. Tr. 25. However, the record shows only that Plaintiff was
19 complaining about her sister-in-law “dumping” her children on Plaintiff, who then
20 had to be in charge of the children when her own mother was away. Tr. 625-26.
21 Plaintiff found the stress and frustration of this overwhelming. Tr. 625. There is
22 no evidence of the ages of the children, what Plaintiff’s responsibilities were, how
23 often this happened, or how long this arrangement continued. Within two weeks of
24 reporting this event to her counselor, Plaintiff had moved out of her parents’ home.
25 Tr. 620. This minimal evidence does not constitute substantial evidence of
26 Plaintiff’s daily activities. *See Trevizo v. Berryhill*, 871 F.3d 664, 681 (9th Cir.
27 2017) (“the mere fact that she cares for small children does not constitute an
28 adequately specific conflict with her reported limitations.”).

1 interfering with seeking more treatment. *Id.* The ALJ did not discuss whether she
2 considered any of these factors before finding Plaintiff's level of mental health
3 treatment to be inconsistent with the severity alleged. There are some indications
4 in the record that Plaintiff's physical impairments overwhelmed her and interfered
5 with her ability to attend mental health counseling more frequently, and at least
6 once Plaintiff indicated a desire to get back into counseling and was slowly taking
7 the necessary steps. Tr. 614-17, 757. The Ninth Circuit has noted that "it is
8 questionable practice to chastise one with a mental impairment for the exercise of
9 poor judgment in seeking rehabilitation." *Nguyen v. Chater*, 100 F.3d 1462, 1465
10 (9th Cir. 1996).

11 An ALJ may cite inconsistencies between a claimant's testimony and the
12 objective medical evidence in discounting the claimant's symptom statements.
13 *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009). But this
14 cannot be the only reason provided by the ALJ. *See Lester*, 81 F.3d at 834 (the
15 ALJ may not discredit the claimant's testimony as to subjective symptoms merely
16 because they are unsupported by objective evidence). "[A]n ALJ does not provide
17 specific, clear, and convincing reasons for rejecting a claimant's testimony by
18 simply reciting the medical evidence in support of his or her residual functional
19 capacity determination." *Brown-Hunter v. Colvin*, 806 F.3d 487, 489 (9th Cir.
20 2015). Furthermore, the treatment records must be viewed in light of the overall
21 diagnostic record. *See Holohan v. Massanari*, 246 F.3d 1195, 1205-1208 (9th Cir.
22 2001); *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1200-01 (9th Cir. 2008).

23 Because none of the ALJ's other reasons satisfy the clear and convincing
24 standard, a lack of support from the medical records alone is an insufficient basis.
25 Furthermore, given the above-mentioned errors in the ALJ's interpretation of the
26 record in context, reconsideration of Plaintiff's subjective complaints is warranted.

27 **4. Step three findings**

28

1 Plaintiff argues the ALJ erred at step three when she failed to explain why
2 Plaintiff's conditions did not meet listing 1.02A or 1.06. ECF No. 13 at 5-8.

3 A claimant is considered disabled at step three when her impairment meets
4 the durational requirement or equals an impairment listed in Appendix 1. 20
5 C.F.R. §§ 404.1520(d), 416.920(d). "An ALJ must evaluate the relevant evidence
6 before concluding that a claimant's impairments do not meet or equal a listed
7 impairment. A boilerplate finding is insufficient to support a conclusion that a
8 claimant's impairment does not do so." *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir.
9 2001). However, the ALJ is not required to state why a claimant fails to satisfy
10 every criteria of the listing if they adequately summarize and evaluate the
11 evidence. *See Gonzalez v. Sullivan*, 914 F.2d 1197, 1200-01 (9th Cir.1990); *Lewis*,
12 236 F.3d at 512.

13 At step three the ALJ found Plaintiff's knee impairment and leg fracture did
14 not meet the criteria for Listing 1.02A or 1.06 "because she did not lose the ability
15 to ambulate effectively, as defined in 1.00B2b." Tr. 19. An inability to ambulate
16 effectively means:

17 an extreme limitation of the ability to walk, i.e., an impairment(s) that
18 interferes very seriously with the individual's ability to independently
19 initiate, sustain, or complete activities. Ineffective ambulation is
20 defined generally as having insufficient lower extremity functioning
21 to permit independent ambulation without the use of a hand-held
22 assistive device(s) that limits the functioning of both upper
extremities.

23 20 C.F.R. Part 404, Subpart P, Appendix 1, Listing 1.00B2b. The definition goes
24 on to give examples of abilities that demonstrate effective ambulation. *Id.*

25 Plaintiff argues the ALJ failed to explain why Plaintiff's knee condition does
26 not meet the criteria. Plaintiff identifies a number of records that indicate she had
27 impairment of her gait and needed various assistive devices. ECF No. 13 at 5-8.
28

1 Because this claim is being remanded on other bases, the ALJ is directed to
2 complete the five-step evaluation process and offer an explanation for her findings
3 at each step of the process.

4 **CONCLUSION**

5 Plaintiff argues the ALJ's decision should be reversed and remanded for the
6 payment of benefits. The Court has the discretion to remand the case for additional
7 evidence and findings or to award benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292
8 (9th Cir. 1996). The Court may award benefits if the record is fully developed and
9 further administrative proceedings would serve no useful purpose. *Id.* Remand is
10 appropriate when additional administrative proceedings could remedy defects.
11 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court
12 finds that further development is necessary for a proper determination to be made.

13 The ALJ's RFC determination is not supported by substantial evidence in
14 this case and must be reevaluated. On remand, the ALJ shall reevaluate the
15 medical evidence and Plaintiff's subjective complaints, formulate a new RFC,
16 obtain supplemental testimony from a vocational expert, if necessary, and take into
17 consideration any other evidence or testimony relevant to Plaintiff's disability
18 claim.

19 Accordingly, **IT IS ORDERED:**

20 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is
21 **GRANTED, IN PART.**

22 2. Defendant's Motion for Summary Judgment, **ECF No. 17**, is
23 **DENIED.**

24 3. The matter is **REMANDED** to the Commissioner for additional
25 proceedings consistent with this Order.

26 4. An application for attorney fees may be filed by separate motion.
27
28

1 The District Court Executive is directed to file this Order and provide a copy
2 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and
3 the file shall be **CLOSED**.

4 **IT IS SO ORDERED.**

5 DATED September 11, 2019.

A handwritten signature in black ink, appearing to be "M", is written above a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE